No. 600.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

LOUIS SALLA, et al.,

PLAINTIFFS IN ERROR,

VS.

THE UNITED STATES OF AMERICA,

DEFENDANTS IN ERROR.

Brief of Plaintiffs in Error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

PATRICK REDDY,
J. C. CAMPBELL,
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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Louis Salla, Frank Barony, Morris Flynn, Francis Butler, Napoleon Nevella, John Lucinette, Dennis O'Rourke, Fred. Shaw, Pat Adudell, Mike Malvey, A. C. Austin, James Cazzaglio, John Doe Parker, George C. Calladge, William Wright, Ed. Boyle, Thomas Murray, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, C. J. Olson, Ed. Albinola, John Burt, Alex. Wills, Paul Corcoran, William Bundren, Joe Vella, Marcus Daly, Mike Wells, Dennis Larry, Pat. Gerard, C. R. Burris, and others whose true names are to the Grand Jurors unknown,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The indictment originally contained three counts. The first count charged that the defendants "on the 29th day

" of April, A. D. 1899, at the County of Shoshone, within " the Northern Division of the District of Idaho, and with- " in the jurisdiction of this Court, then and there being, " did then and there unlawfully, wickedly and maliciously " confederate and conspire together to commit an offense " against the United States, that is to say, to unlawfully, " willfully, maliciously, and knowingly delay, prevent, ob- " struct, and retard the movement and passage of a certain " railway car and train over the lines and tracks of the " Northern Pacific Railway Company by the said Northern " Pacific Railway Company, the said Northern Pacific " Railway Company then and there being engaged in " the business of a common carrier of the mails of the " United States, which said railway car and train were " then and there carrying and transporting the mails of " the United States," * * * and further charged that to effect the object of said alleged conspiracy said defendants "did then and there unlawfully, forcibly, ma- " liciously, and knowingly delay, arrest, obstruct, and re- " tard the movement and passage of a certain railway car " and train over the lines and tracks of the Northern Pa- " cific Railway Company by the said company," * * *.

In the second count of the indictment the defendants are accused of having seized, controlled, stopped, delayed and backed a certain car and train then and there containing the mails of the United States and being run and transported over the railway lines and tracks of the Northern Pacific Railway Company.

The third count is in effect the same as the second, except that the defendants are charged with having delayed the

United States mails being transported over the lines and tracks of the Oregon Railroad and Navigation Company.

The evidence shows that on the 29th day of April, 1899, a Northern Pacific train was boarded by a large number of men, between the towns of Burke and Wallace; that when the train reached Wallace, which is the terminus of that particular branch of the Northern Pacific Railway, some of these men compelled the engineer to run his train over the tracks of the Oregon Railroad and Navigation Company to Wardner Junction, a place about twelve miles west of Wallace.

The mob then proceeded to the mill of the Bunker Hill and Sullivan Mining and Concentrating Company, located near Wardner Junction, and destroyed it by the use of dynamite, after which the rioters dispersed and returned on the train to Wallace and the points from which they had come.

On the 26th day of October, 1899, the defendants, Fred W. Garrett (indicted under the name of Charley Garrett), Dennis O'Rourke, C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, W. V. Bundren (indicted under the name of William Bundren), Fred E. Shaw (indicted under the name of Fred Shaw), John Lucinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey and Francis Butler, were brought into Court to plead to the indictment theretofore filed against them.

Said defendants thereupon moved to quash said indictment (Tr., pp. 14 to 16), which motion the Court denied and defendants excepted. (Tr., p. 66.)

Defendants then filed their general demurrer and special

demurrer to said indictment (Tr., pp. 9 to 13), both of which were overruled by the Court and defendants excepted. (Tr., p. 66.)

Said defendants then filed a motion to require the prosecution to elect upon which count in the indictment it would proceed to trial (Tr., pp. 7, 8), which motion was denied and defendants excepted. (Tr., p. 66.)

Thereafter defendants moved the Court to have subpoenas issued and witnesses summoned for the defense at the expense of the United States, and in support thereof filed affidavits stating the materiality of the evidence and their inability to pay the expenses of obtaining said witnesses (Tr., pp. 92 to 120). The Court allowed the defendants to summon twenty witnesses at the expense of the United States, but denied the motion as to the request for other witnesses named in the affidavits of defendants, to which ruling the defendants excepted. (Tr., pp, 68, 69.)

Defendants at the same time requested that a subpoena *duces tecum* issue for H. M. Davenport, requiring him to appear in Court and produce the testimony of certain witnesses taken at the inquest upon the bodies of James Cheyne and John Smith, and in support thereof filed affidavits stating the materiality of said testimony. (Tr., pp. 92 to 120.) The Court denied the request and defendants excepted. (Tr., pp. 68, 69.)

Defendants at the same time requested that a subpoena *duces tecum* issue for H. M. Davenport, requiring him to appear in Court and produce the testimony of certain witnesses taken at the inquest upon the bodies of James Cheyne and John Smith, and in support thereof filed affi-

davits stating the materiality of said testimony. (Tr., pp. 92 to 120.) The Court denied the request, and defendants excepted. (Tr., pp. 68, 69.)

After the defendants had peremptorily challenged three persons called to act as jurors, they asked leave to exercise a fourth peremptory challenge, which request the Court denied, and defendants excepted. (Tr., p. 70.)

Thereupon a jury was empaneled and sworn to try the case.

The defendants also moved the Court that a subpoena *duces tecum* be issued and served upon S. H. Hays, W. E. Borah and J. H. Hawley, requiring them to appear and bring with them the books containing the shorthand notes of the testimony of certain witnesses given at the inquest held on the bodies of James Cheyne and John Smith (Tr., p. 290), which motion was denied and defendants excepted. (Tr., pp. 71, 72.)

At the close of the testimony for the prosecution the Court, on motion of the District Attorney, ordered that the second and third counts in the indictments be dismissed, and afterwards instructed the jury that it should consider only the first count in the indictment, i. e., the count charging the defendants with conspiracy to obstruct and retard the passage of the mails.

The jury returned a verdict of guilty, as charged in the indictment, against the defendants Dennis O'Rourke, C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, John Lucinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey and Francis Butler.

Thereafter said defendants filed and presented their motion for a new trial (Tr., p. 47), which was denied by the Court and defendants excepted. (Tr., p. 80.)

Defendants then filed and presented their motion for arrest of judgment (Tr., pp. 327 to 331), which was denied by the Court and defendants excepted. (Tr., p. 81.)

Thereupon the Court pronounced judgment against the defendants, adjudging that each of them pay a fine of $1,000.00, and stand committed until said fine is paid; and also sentenced the defendants C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, John Lucinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey and Francis Butler to imprisonment in the California State's prison at San Quentin, California, for the term of twenty-two months, and the defendant Dennis O'Rourke to imprisonment in said prison for the term of twenty months. (Tr., pp. 82, 83.)

Defendants then sued out this writ of error.

THE QUESTIONS RAISED.

The questions involved are presented by a Bill of Exceptions and the Roll, and relate to various rulings of the District Court upon the pleadings and during the trial, and the insufficiency of the evidence to support the verdict.

First. The motion to quash the indictment sets forth that there is a misjoinder of counts in said indictment, in that the first count charges the defendants with the commission of a felony, and the second and third counts charge the commission of misdemeanors, and that the said several counts are not for the same act or transaction, or for two

or more acts of the same class of crimes or offenses which may be properly joined; but that the offenses alleged in the different counts are separate and distinct offenses, in nowise related to each other. (Tr., pp. 14 to 16.)

The Court denied the motion and defendants excepted.

Second. The defendants moved the Court to require the prosecution to elect as to which count it would proceed to try defendants on. (Tr., pp. 7, 8.)

The motion was overruled and defendants excepted.

Third. Each of the defendants filed affidavits in support of their motion to have subpoenas issued and witnesses summoned for the defense at the expense of the United States, and said affidavits stated the materiality of the evidence and the inability of the defendants to pay the expense of bringing said witnesses into Court. (Tr., pp. 92 to 120.)

The Court denied the motion in part as to witnesses for each defendant, and allowed the defendants to have twenty witnesses summoned at the expense of the United States, to which ruling the defendants excepted. (Tr., pp. 68, 69.)

Fourth. After the defendants had peremptorily challenged three persons called to act as jurors, they asked leave of the Court to exercise a fourth peremptory challenge, on the ground that defendants were on trial for the commisison of a felony, and were entitled to ten peremptory challenges. (Tr., p. 70.)

The Court denied the request and the defendants excepted.

Fifth. The defendants moved the Court that a subpoena *duces tecum* issue for H. M. Davenport, requiring

him to appear in Court and produce the testimony of certain witnesses taken at the inquest on the bodies of James Cheyne and John Smith. Many of the witnesses for the prosecution had testified at said inquest as to the alleged facts upon which they were examined in chief by the prosecution in this case, and defendants requested the testimony given at said inquest for the purpose of contradicting and impeaching said witnesses. The testimony referred to had been filed with and was in the custody of said H. M. Davenport, as Clerk of the District Court of the First Judicial District of the State of Idaho in and for Shoshone County, and within the jurisdiction of the Court before whom this case was tried. (Tr., p. 92 to 120.)

The Court denied the motion and defendants excepted.

Sixth. Defendants moved the Court that a subpoena *duces tecum* be issued and served upon S. H. Hays and W. E. Borah and J. H. Hawley, requiring them to appear and bring with them the books containing the shorthand notes of the testimony of certain witnesses given at the inquest held on the bodies of James Cheyne and John Smith in Shoshone County, Idaho. (Tr., p. 290.)

The Court denied the motion and defendants excepted.

Seventh. The District Court refused the following instructions requested by defendants:

"IV.

"If the defendants, or any of them, belonged to such organiation or association for lawful purposes, and that some of the members, as individuals, or combined with others, independent of the organization, to willfully and

maliciously carry out the unlawful purpose as set forth in the indictment, but that such organization as a whole, or these defendants as individuals, did not join or participate in such combination, then such defendant or defendants cannot be held responsible for the acts of such combination or of such individuals." (Tr., p. 42.)

Defendants excepted.

Eighth. The District Court refused the following instruction requested by defendants:

"V.

"If you find that the defendants, or any of them, did not combine to obstruct or retard the passage of the United States mail, as set forth in said first count, then such defendants should be acquitted." (Tr., p. 43.)

Defendants excepted.

Ninth. The District Court refused the following instruction requested by defendants:

"VI.

"The offense charged in said first count, to wit, obstruct and retard the passage of the mail, as therein set forth, is an offense exclusively against the United States, and cognizable only in the Federal Courts. It is not an offense against the State of Idaho.

"The stopping of railroad trains and railroad cars is an offense against the State of Idaho, and not an offense against the United States." (Tr., p. 43.)

Defendants excepted.

Tenth. The district Court refused the following instruction requested by the defendants:

"VII.

"The evil intent in committing the offense against the State of Idaho is not sufficient to constitute the offense charged in this indictment. To constitute the offense set forth in said indictment, the specific intent to violate the laws of the United States and to commit the crime of willfully and knowingly obstructing and retarding the United States mails, as set forth in said count, must be found to have existed in the minds of the defendants in order to justify a conviction." (Tr., p. 43.)

Defendants excepted.

Eleventh. The District Court refused the following instruction requested by the defendants:

"VIII.

"The meaning of the words 'knowingly' and 'willfully' is defined as follows: 'Doing or omitting to do a thing knowingly or willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it,' and to constitute the crime set forth in said first count, it must be proved, beyond a reasonable doubt, that the act of obstructing or retarding the passage of the mail was done knowingly and willfully by the defendants; that is to say, that they intended to do it." (Tr., pp. 43, 44.)

Defendants excepted.

Twelfth. The District Court refused the following instruction requested by the defendants:

"IX.

"If you find from the evidence that a conspiracy was formed by a number of persons for the purpose and with the intent to commit a crime against the State of Idaho, and that incidentally the United States mail was obstructed or retarded by said conspirators, but without any knowledge and without any intention on the part of said conspirators to obstruct or retard the mail, such acts would not constitute an offense against the United States." (Tr., p. 44.)

Defendants excepted.

Thirteenth. The Dictrict Court refused the following struction requested by the defendants:

"XI.

"In order to make one an aider and abettor of conspirators, it is necessary that he should do or say something showing his consent to the felonious purpose and contributing to its execution." (Tr., p. 44.)

Defendants excepted.

Fourteenth. The District Court refused the following instruction requested by the defendants:

"XII.

"You are instructed that it makes no difference in this case whether the United States mails were obstructed or retarded. The offense in this case consists in the unlawful

agreement or conspiracy to obstruct or retard. If there was no agreement or conspiracy to obstruct, then the defendants are not guilty of the crime charged and you should acquit them.

"Obstructing and retarding the passage of the United States mail is a distinct and independent offense from that of conspiring to obstruct and retard." (Tr., p. 45.)

Defendants excepted.

Fifteenth. The motion for a new trial raises the question that the verdict is contrary to law and the evidence in the case.

Many other questions are raised as to the admisison of and rejection of evidence.

SPECIFICATION OF ERRORS.

The following are the errors relied upon by Plaintiffs in Error to sustain the prayer for a reversal of the judgment:

I.

The Court erred in denying defendants' motion to quash the indictment filed against the defendants herein.

II.

The Court erred in denying defendants' motion to require the prosecution to elect whether it would try the defendants on the first, second, or third counts contained in said indictment.

IV.

The Court erred in denying defendants' request to exercise a fourth peremptory challenge during the impanel-

ment of the jury, and in refusing to allow defendants more than three peremptory challenges to the jury.

V.

The Court erred in limiting the number of witnesses, at the expense of the Government, for the defendants, to twenty; and in refusing to allow the defendants more than twenty witnesses at the expense of the Government.

VI.

The Court erred in denying the defendants' request for a subpoena duces tecum directed to H. M. Davenport, commanding him to appear in said court and bring with him the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, and Jos. Kendall, taken at the Coroner's inquest upon the bodies of James Cheyne and John Smith in Shoshone County, Idaho, and in refusing to order that said subpoena be issued.

VII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "What official position, if any, did you occupy in that union on the 29th of April?"

VIII.

The Court erred in overruling the defendants' objection to the question asked the witness John Clark: "State whether or not that is a union mine; that is, the Standard mine, employs union labor—members of the union."

IX.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "Mr. Clark, will you state where the different unions are located in the Coeur d'Alene country?"

X.

The Court erred in denying defendants' motion to strike out the answer of the witness John Clark: "They were standing around talking about waiting for the train coming up, when we were all going down to Wardner."

XI.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "You may state what their object was in going to Wardner."

XII.

The Court erred in allowing the witness John Clark to answer: "That morning when we came off of the night shift we was informed we were to go to Wardner."

XIII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "From whom did you get that information, a member of the union?"

XIV.

The Court erred in denying defendants' motion to strike out the answer of the witness John Clark: "No, sir; I do

not know just how the information got to the mine, but I was told by the miners."

XV.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "Now, Mr. Clark, I desire you to state what you did that day, so far as the events of that morning are concerned, that is, going to Wardner."

XVI.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "State how you happened to go into a box-car."

XVII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "State why you did not get into the passenger coach."

XVIII.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark on cross-examination: "Did anybody talk to you about the evidence you should give on the trial of Corcoran, after you got to Wallace at any time? State what was said to you and by whom."

XIX.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark on cross-examina-

tion: "Do you know whether or not he is a stockholder in the Bunker Hill and Sullivan Mining and Concentrating Company?"

XX.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark on cross-examination: "I will ask you if prior to the trial of Paul Corcoran, and on the day when you were called there as a witness on that trial, Mr. Mace Campbell did not address you in the sheriff's office and tell you that it would be better for you to stick to what you had said before the coroner's jury. Did you not testify in the District Court of the First Judicial District, in and for Shoshone County, on the trial of Paul Corcoran, as follows:

"Q. Was there anything said to you about your testimony at any time since your second arrest?

"A. No, sir.

"Q. At any time? A. No, sir.

"Q. Not to-day? A. Well, yes.

"Q. When?

"A. This morning I was approached by one man down here.

"Q. What is his name? A. Mace Campbell.

"Q. Go ahead.

"A. And he told me it was better for me to stick up to what I had said down before the coroner's jury—"

XXI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Mr. Ames,

I will ask you what relation the Wardner union bears to other miners' unions in the Coeur d'Alenes."

XXII.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "What was the report of that committee?"

XXIII.

The Court erred in overruling defendants' objection to the testimony of the witness Thomas Ames: "The meeting was closed then, and we all went to the Bunker Hill in a body to get the men that was still working in the Bunker Hill," and to all testimony of said witness of a similar character.

XXIV.

did you get that information, a member of the union?"

The Court erred in overruling defendants' objection to the qestion asked the witness Thomas Ames: "I will ask you to state briefly what took place on the 29th of April—came under your observation, commencing in the morning. Well, what you did and what you saw."

XXV.

The Court erred in denying defendants' motion to strike out the testimony of the witness Thomas Ames: "Well, I went to Page's Hotel and found out what I could, in the morning, what was going on. In fact, I didn't find anything much, because no one seemed to know anything about

it, only was to go to the depot at 11 o'clock to meet a train. Two or three of the boys told me not to go down—to stay there. I went into Mr. Page's Hotel, Mr. Cox's store—."

XXVI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Did you have a statement from any member of the union that would lead you to believe it—cause you to believe it?"

XXVII.

The Court erred in denying defendants' motion and request that a subpoena duces tecum be issued and served upon S. H. Hays, W. E. Borah, and J. H. Hawley, requiring them to appear and bring with them books containing the shorthand notes of the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joseph Phifer, A. M. St. Clair, Jas. B. Pipes, and Jos. Kendall, taken at the inquest held upon the bodies of James Cheyne and John Smith in Shoshone County, Idaho.

XXVIII.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Was it not the talk among the members of the Wardner union that necessary force would be exerted to drive the non-union employees out of the camp, or prevent their working in the Bunker Hill and Sullivan, and was not that the talk among the members of the Wardner union?"

XXX.

The Court erred in overruling defendant's objection to the question asked the witness Albert Burch: "Mr. Burch, I desire you to commence with the week preceding the blowing up of the Bunker Hill and Sullivan mill and relate briefly the occurrences so far as the troubles between the Wardner union and your company are concerned."

XXXII.

The Court erred in denying defendants' motion to strike out that part of the answer of the witness Albert Burch as to what effect the notice had upon his mind: "Wardner, Idaho, April 13th, 1899. At a regular meeting of the Wardner miners' union, April 18th, W. F. M., held upon the above date, it was decided to request all men employed in and about the Bunker Hill and Sullivan mine to make application for membership in the Wardner miners' union immediately. (Signed) N. A. Flynn, Committeeman. That attracted my attention to the possibility of there being agitation in progress in the mine."

XXXV.

The Court erred in overruling defendant's objection to the statement of the witness Albert Burch, as to what he had said to the employees of the Bunker Hill and Sullivan Company.

XXXVII.

The Court erred in overruling defendant's objection to the question asked the witness Walter Taylor: "I will ask

you if you had any conversation with Mr. Ed. Boyle, president of the Wardner miners' union, on or about the 26th of April, relative to your going to work, or heard any statement made by Boyle in regard to you or men going to work in the Bunker Hill and Sullivan mine."

XXXVIII.

The Court erred in overruling defendants' objection to the question asked the witness I. T. Rouse: "State what he said, if anything, about the Western Federation of Miners."

XXXIX.

The Court erred in overruling defendants' objection to the question asked the witness F. R. Culbertson: "I will ask you if you had any conversation with Mr. Corcoran on the morning of the 29th of April relative to where he was going that day, or where the members of the Burke union were going."

XL.

The Court erred in overruling defendants' objection to the testimony of the witness Emil Anderson that he did not work on April 29th, 1899; that on the morning he was told by some men there would be no work that day, and that there would be a meeting in the union hall; that he did not know who it was informed him but that he attended the meeting at the hall, and to all testimony of like character.

XLII.

The Court erred in denying defendants' motion to strike

out the portion of the answer of the witness A. M. St. Clair referring to the defendant Malvey: "A. I have been in the penitentiary, yes. There is where I met Mr. Malvey."

XLIII.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny for the purpose of contradicting the witness.

XLIV.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny for the purpose of showing that said witness had given a different name at the time of his conviction than at this time.

XLV.

The Court erred in sustaining plaintiffs' objection to the defendants' offer to introduce the record of the conviction of the witness St. Clair for larceny for the purpose of showing the character of the witness.

XLVI.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny for the purpose of impeaching said witness.

XLVIII.

The Court erred in overruling defendants' objection to the question asked the witness St. Clair: "You stated you were in the penitentiary; state to the jury whether you were pardoned out."

L.

The Court erred in overruling defendants' objection to the question asked the witness G. A. Olmstead: "What time do you go by there?"

LI.

The Court erred in denying defendants' motion to strike out the answer of the witness Olmstead: "Well, there was quite an excitement at Wardner. There was big gangs of masked men there, armed, and a great deal of excitement. Blowed up the mill."

LIV.

The Court erred in overruling defendants' objection to the testimony of the witness Marshall as to the delay of the mail at Wardner.

LVIII.

The Court erred in overruling defendants' objection to the question asked the witness, Mrs. Tony Tubbs: "What came under your observation then in regard to the troubles between the union and the Bunker Hill and Sullivan mine?"

LIX.

The Court erred in overruling defendants' objection to the question asked the witness L. W. Hutton: "Was there anything on any of the cars in the way of a notice or mark to show that their cars were carrying United States mail?"

LX.

The Court erred in overruling defendants' objection to the answer of the witness J. H. Martin: "He said, when they got down to Wardner, they detailed about seventy-five men—throwed them out on the left-hand side, along a ridge—high piece of ground. Said there was a lot of men went to the mill, placed dynamite in place."

LXI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Wright: "Why not?"

LXIII.

The Court erred in overruling defendants' motion to strike out all testimony of the witnesses A. Burch, Fred Funk, A. M. St. Clair, William McMurtie, A. S. Crawford, Sophia Moffit, M. J. Sinclair, William Doherty, and James H. Martin.

LXIV.

The Court erred in denying the defendants the right to show to the jury by the witness J. H. Forney that the pros-

ecution had withheld evidence which would impeach certain witnesses for the prosecution, and that the prosecution had not acted in good faith toward the deefendants.

LXV.

The Court erred in refusing to allow defendants to show by the witness J. H. Forney that the shorthand notes of the testimony taken before the coroner of Shoshone county, Idaho, upon the inquest on the bodies of James Cheyne and John Smith were withheld from the defendants, and that witness refused to produce them, and that the United States District Attorney prosecuting this case joined said Forney in opposition to defendants' request for said shorthand notes.

LXVI.

The Court erred in sustaining plaintiffs' objection to the question asked the witness James B. Pipes, while said witness was testifying in rebuttal: "You remember that very distinctly—those expressions—and you expect now that the jury will be excited, do you not?"

LXVII.

The Court erred in not striking out all of the testimony concerning the action of the parties engaged in blowing up the Bunker Hill mill, and all declarations and statements of the parties thus engaged, and all testimony concerning the actions and declarations of the members of the various miners' unions concerning their actions and intentions in reference to driving away the employees of the Bunker Hill and Sullivan Mining and Concentrating Com-

pany, and all testimony concerning the acts of the miners' unions.

LXVIII.

The Court erred in not striking out all the testimony concerning any conspiracy on the part of the members of the various miners' unions to blow up or injure the Bunker Hill mill, or to interfere with the employees of the Bunker Hill and Sullivan Mining and Concentrating Company, or concerning any conspiracy except the conspiracy alleged in the first count of the indictment.

LXIX.

The Court erred in not striking out all of the evidence concerning the acts, declarations, or statements of any person or persons not shown to be indicted with the defendants or shown to be engaged in the conspiracy alleged in the first count of the indictment.

LXXI.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered IV:

"If the defendants, or any of them, belonged to such organization or association for lawful purposes, and that some of the members as individuals or combined with others, independent of the organization, to willfully and maliciously carry out the unlawful purpose as set forth in the indictment, but that such organization as a whole, or these defendants as individuals, did not join or participate in such combination, then such defendant or defendants

cannot be held responsible for the acts of such combination or of such individuals."

LXXII.

The Court erred in refusing to give the jury the following instruction requested by the defendants and numbered V:

"If you find that the defendants, or any of them, did not combine to obstruct or retard the passage of the United States mail, as set forth in said first count, then such defendants should be acquitted."

LXXIII.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VI:

"The offense charged in said first count, to wit, obstruct and retard the passage of the mail as therein set forth, is an offense exclusively against the United States and cognizable only in the federal courts. It is not an offense against the State of Idaho. The stopping of the railroad trains and railroad cars is an offense against the State of Idaho and not an offense against the United States."

LXXV.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VII:

"The evil intent in committing the offense against the State of Idaho is not sufficient to constitute the offense

charged in this indictment. To constitute the offense set forth in said indictment, the specific intent to violate the laws of the United States and to commit he crime of willfully and knowingly obstructing and retarding the United States mails, as set forth in said count, must be found to have existed in the minds of the defendants in order to justify a conviction."

LXXVI.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VIII:

"The meaning of the words 'knowingly' and 'willfully' is defined as follows: 'Doing or omitting to do a thing knowingly or willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it,' and to constitute the crime set forth in said first count, it must be proved, beyond a reasonable doubt, that the act of obstructing or retarding the passage of the mail was done knowingly and willfully by the defendants; that is to say, that they intended to do it."

LXXVII.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered IX:

"If you find from the evidence that a conspiracy was formed by a number of persons for the purpose and with the intent to commit a crime against the State of Idaho, and that incidentally the United States mail was obstructed or retarded by said conspirators, but without any

knowledge and without any intention on the part of said conspirators to obstruct or retard the mail, such acts would not constitute an offense against the United States."

LXXVIII.

The Court erred in refusing to give to the jury the following instruction requested by the defendants, numbered XI:

"In order to make one an aider and abettor of conspirators, it is necessary that he should do or say something showing his consent to the felonious purpose and contributing to its execution."

LXXIX.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered XII:

"You are instructed that it makes no difference in this case whether the United States mails were obstructed or retarded. The offense in this case consists in the unlawful agreement or conspiracy to obstruct and retard. If there was no agreement or conspiracy to obstruct, then the defendants are not guilty of the crime and you should acquit them. Obstructing and retarding the passage of the United States mail is a distinct and independent offense from that of conspiring to obstruct and retard."

LXXXI.

The Court erred in overruling defendants' motion for a new trial.

BRIEF OF ARGUMENT.

I.

The Court erred in denying defendants' motion to quash the indictment filed against the defendants herein.

The indictment contains three counts, alleging three separate and distinct offenses.

The first count is founded on Section 5440 of the Revised Statutes of the United States charging a conspiracy to commit an offense against the United States, which we will hereafter endeavor to show is a felony.

The second and third counts are founded on Section 3995 of the Revised Statutes of the United States, for obstructing and retarding the United States mails, which is a misdemeanor.

The joinder is not authorized by Section 1024 of the Revised Statutes of the United States.

Roe on Crim. Proc., p. 56, and notes.

The offenses alleged are separate and distinct, founded upon different statutes and punishable by different penalties and triable by different methods.

It is alleged in the first and second counts that the offenses there alleged were committed on the railway lines and tracks of the Northern Pacific Railway Company.

The offense charged in the third count is alleged to have

been committed on the lines and tracks of the Oregon Railroad and Navigation Company.

That the offense charged in the first count is separate and distinct from the offenses charged in the second and third counts is apparent upon the face of the indictment. To show that they are not of the same class, we cite the case of Clune et al. *vs.* United States, 159 U. S., 590, 595, in which it is said:

"The language of the section is plain and not open to "doubt. A conspiracy to commit an offense is denounced "as itself a separate offense, and the punishment there- "for fixed by statute. * * * The power exists to sepa- "rate the conspiracy from the act itself and to affix dis- "tinct and independent penalties to each."

These offenses are not subject to the same punishment. Counts for conspiracy cannot be joined with counts for murder.

U. S. *vs.* Scott, 4 Biss., 29;
U. S. *vs.* Gaston, 28 Fed. Rep., 848.

Offenses cannot be joined under Section 1024, Revised Statutes of the United States, unless of the same class and incurring the same kind of punishment.

U. S. *vs.* Bennett, 17 Blatchf., 357;
U. S. *vs.* Peterson, 27 Fed. Cases (Case No. 16,037), 521;
U. S. *vs.* Sharp, 27 Fed. Cases (Case No. 16,265), 1046.

Felony and misdemeanor cannot be joined in one indictment.

1 Bishop's New Crim. Proc., Sec. 445, p. 275-6;
Wharton's Am. Crim. Law, Sec. 418.

Indictments for different offenses, not provable by the same evidence and in no sense resulting from the same series of acts, cannot be united for trial.

McElroy et al. *vs.* U. S., 164 U. S., 76.

Our contention is that the first count charged a felony. This raises the question: How is an offense determined to be a felony in the Federal Courts in the absence of express terms so designating it in the statute creating the same?

For many years this was a vexed question, hedged about with much doubt and uncertainty.

Two recent decisions by the Supreme Court of the United States are decisive of the point.

Bannon & Mulkey, *vs.* U. S., 156 U. S., 464;
Reagan *vs.* U. S., 157 U. S., 301.

In Bannon & Mulkey *vs.* U. S., Mr. Justice Brown said:

"By statute, in some of the States, the word 'felony' is "defined to mean offenses for which the offender, on con- "viction, may be punished by death or imprisonment in the "State prison or penitentiary."

In the Regan case, Mr. Justice Brewer said:

"It may be conceded that the present common under- "standing of the word (felony) departs largely from the

" technical meaning it had at the old common law. This
" departure is owing to the fact that the punishments other
" than death, to wit: forfeiture of the lands or goods of the
" offender, which formerly constituted the test of felony,
" are no longer inflicted, at least in this country, and to the
" further fact that in many of the States offenses are by
" statute divided into two classes, felonies and misdemean-
" ors, the former including all offenses punishable by death,
" or imprisonment in the penitentiary, and the latter those
" punishable by fine or imprisonment in a county jail; and
" in other States, in which no statutory classification is
" prescribed, many offenses punishable by imprisonment in
" a penitentiary are, in terms, declared to be felonies.
" These matters have thrown about the meaning of the
" word as ordinarily used no little uncertainty. Indeed, in
" Webster's Dictionary, after the common law definition of
" the term, there are quoted from John Stuart Mill these
" pertinent observations: 'There is not a lawyer who would
" 'undertake to tell what a felony is, otherwise than by
" 'enumerating the various offenses which are so called.
" 'Originally, the word "felony" had a meaning: it denoted
" 'all offenses the penalty of which included forfeiture of
" 'goods; but subsequent acts of Parliament have declared
" 'various offenses to be felonies, without enjoining that
" 'penalty, and have taken away the penalty from others,
" 'which continue, nevertheless, to be called felonies, in so
" 'much that the acts so called have now no property what-
" 'ever in common, save that of being unlawful and punish-
" 'able.' (1 Mill's Logic, 40.)

"*There is no statutory definition of felonies in the legis-*
"*lation of the United States. We must, therefore, look*
"*elsewhere for the meaning of the term.* The question was
" recently before us in Bannon & Mulkey *vs.* United States,
" 156 U. S., 464, 468, and Mr. Justice Brown, delivering the
" opinion of the Court, after referring to the statutory pro-
" visions in some of the States, said: 'But in the absence
" 'of such statute the word is used to designate such serious
" 'offenses as were formerly punishable by death, or by
" 'forfeiture of the lands or goods of the offender.'"
(Italics are ours.)

In substance, this decision holds, first, that we cannot look to the common law for a definition of felony; second, that there is no definition of felony in the legislation of the United States.

" We must, therefore, look *elsewhere* for the meaning of
" the term."

Quere: To what source does "elsewhere" refer?

The logic of the proposition is clear. There are but three sources of law: (1) the common law; (2) the Acts of Congress; (3) the statutes of the States.

The decision of the Supreme Court eliminates the first and second, and leaves the solution of the question to the third.

Referring to these statutes of the States, the Court says: " But in the *absence* of these statutes," etc., thereby clearly indicating that such statute, if there be one in the State, is decisive of the point.

In Idaho there is such a statute.

"A felony is a crime which is punishable with death or "by imprisonment in the territorial prison."

Rev. Stats. of Idaho, Sec. 6311.

Under the foregoing decisions conspiracy to commit an offense against the United States is a felony, because Section 5440 of the Revised Statutes of the United States provides that "all the parties to such conspiracy shall be liable "to a penalty of not more than ten thousand dollars, or to "imprisonment for not more than two years, or by both "fine and imprisonment, in the discretion of the Court."

II.

The Court erred in denying defendants' motion to require the prosecution to elect whether it would try the defendants on the first, second or third counts contained in said indictment.

The joinder of these several offenses in the indictment necessarily tended to embarrass the defendants in preparing their defense, and the Court should, therefore, have required the prosecution to elect.

Engelman *vs.* State, 2 Ind., 91;
State *vs.* Abrahams, 6 Ia., 117;
State *vs.* Cajean, 8 La. Ann., 109;
State *vs.* Porter, 26 Mo., 206;
State *vs.* Lincoln, 49 N. H., 464;
Kane *vs.* People, 8 Wend., 203, 211;
Com. *vs.* Gillespie, 7 Serg. & R., 469; 10 A. D;
Regina *vs.* Heywood, 1 Leigh & C., 451;

Wharton's Crim. Pl. & Pr., Sec. 294;
State *vs.* Bell, 92 Am. Dec., 663, note.

Where two or more distinct offenses are charged, the proper practice is to require the prosecuting officer to elect one of the offenses and confine himself to it.

State *vs.* Scott, 15 S. C., 436;
State *vs.* Nelson, 14 Rich., 169, 172;
State *vs.* Fidment, 35 Ia., 541.

If, by reason of the nature of the offenses charged, or because of the mode of proofs, there is a possibility of prejudice to defendant at his trial, he may move the prosecution to elect.

Pettes *vs.* Com., 126 Mass., 242.

Where an indictment joined two felonies and a misdemeanor, held, error not to compel election.

State vs. Nelson, 94 Am. Dec., 130 (S. C.).

If it is manifested that the discretion of the Court has been abused to the obvious and palpable detriment of the accused, a new trial will be granted.

State *vs.* Gray, 37 Mo., 464;
State *vs.* Danhert, 42 Mo., 242;
Womack *vs.* State, 7 Cald., 508;
State *vs.* Nelson, 14 Rich., 169, 172;
Fisher *vs.* State, 33 Tex., 772;
Sims *vs.* State, 10 Tex. App., 131.

If the joinder is not proper, i. e., two or more felonies of different grade, or offenses of different class, viz., felony and misdemeanor, the Court should compel election.

McElroy *vs.* U. S., 164 U. S., 76, 80.

The District Attorney dismissed the second and third counts of the indictment, but not until after the testimony on both sides had been closed, and the defendant had suffered all the injury which could result from the failure to elect at an earlier stage of the proceedings. (Tr., p. 321.)

The defendants were prejudiced by the refusal of the Court to compel the prosecution to elect between the counts. The day after the refusal an application was made by which the defendants asked for process at the expense of the United States to compel the attendance of a number of witnesses (about forty in all) for the defense. The Court allowed the motion for but twenty witnesses.

If the defendants had been advised that they would not be compelled to defend on the second and third counts, they would have made a different selection of witnesses, and would have summoned only such as could testify upon the charge of conspiracy alleged in the first count.

They were thus compelled to exhaust the process allowed them upon witnesses who could not assist them in defending against the charge contained in the first count.

The election should have been made at the close of the evidence on the part of the Government and before the defendants put in their case.

State *vs.* Gomes, 57 Pac Rep. 262 (Kas.);

Gardes *vs.* U. S., 87 Fed., 172;

State *vs.* Fidment, 35 Ia., 541;
State *vs.* Scott, 15 S. C., 436;
State *vs.* Nelson, 4 Rich., 169-172.

It was prejudicial to the defendants to compel them to exhaust their witnesses in defending against the charges contained in the second and third counts. The crimes were alleged to have been committed on different railroads and at different places.

The defendants were also prejudiced by the admission of evidence on the part of the prosecution in support of the second and third counts, which would have been inadmissible if the defendants had been tried only for the conspiracy alleged in the first count, and which tended to prejudice the defendants and confuse the jury.

IV.

The Court erred in denying defendants' request to exercise a fourth peremptory challenge during the impanelment of the jury, and in refusing to allow defendants more than three peremptory challenges to the jury.

The Court below limited the defendants to three peremptory challenges. (Tr., p. 70.)

This was reversible error.

Section 819, Rev. Sts. U. S., provides as follows:

"When the offense charged is treason, or a capital "offense, the defendant shall be entitled to twenty and the "United States to five peremptory challenges. On the trial "of any other felony, the defendant shall be entitled to ten

"and the United States to three peremptory challenges."
* * *

Our contention is that the defendants were charged with a felony, to wit: conspiracy, and should have been allowed ten peremptory challenges.

As to whether the charge contained in the first count in the indictment constitutes a felony, we have cited authorities under Assignment of Error No. II.

V.

The Court erred in limiting the number of witnesses at the expense of the Government, for the defendants, to twenty, and in refusing to allow the defendants more than twenty witnesses at the expense of the Government.

Section 878, Rev. Stats. U. S., provides that:

"Whenever any person indicted in a Court of the United "States makes affidavit, setting forth that there are wit- "nesses whose evidence is material to his defense; that he "cannot safely go to trial without them; what he expects "to prove by each of them; that they are within the dis- "trict in which the Court is held, or within one hundred "miles of the place of trial; and that he is not possessed of "sufficient means, and is actually unable to pay the fees of "such witnesses, the Court in term, or any Judge thereof "in vacation, may order that such witnesses be subpoenaed, "if found within the limits aforesaid." * * *

The affidavits presented by the defendants (Tr., pp. 92 to 120, set forth all the facts required by this statute.

It is provided that the Court "in term, or any Judge

"thereof in vacation, *may* order that such witnesses be "subpoenaed." (Italics are ours.)

When an affidavit containing the facts required is properly presented, is it discretionary with the Court whether it will order such witnesses to be subpoenaed? May the Court refuse to issue the subpoena for any witnesses on the part of the defense, under this section?

We have been unable to find any case wherein this question has been passed upon. If it is discretionary, of course it must be a legal discretion, and if the affidavit states all the facts required by the statute, and there is nothing in it to intimate to the Court that the affidavit is not made in good faith, the Court would not be warranted in refusing to order the witnesses named therein subpoenaed.

If the testimony of the witnesses as set forth in the affidavit would be simply cumulative, the Court might reduce the number, but nothing of that kind appears in these affidavits.

Thirteen defendants were to be tried, and were required to defend upon three counts. They requested about forty witnesses. This does not seem to be an unreasonable number, especially as the Government called forty-nine witnesses for the prosecution.

VI.

The Court erred in denying the defendants' request for a subpoena duces tecum directed to H. M. Davenport, commanding him to appear in said Court and bring with him the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes,

Ed. Booth, and Jos. Kendall, taken at the coroner's inquest upon the bodies of James Cheyne and John Smith in Shoshone County, Idaho, and in refusing to order that said subpoena be issued.

Each of the defendants filed an affidavit and a request for the issuance of a subpoena *duces tecum* for H. M. Davenport, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, commanding him to attend as a witness and bring with him the testimony of J. M. Porter, M. J. Sinclair, John Clark and others therein named, taken at the inquest on the bodies of James Cheyne and John Smith, in Shoshone County, Idaho, and stating that said testimony had been filed with said Clerk. (Tr., pages 92-120.)

The testimony of said Davenport was material and important in order to identify the testimony taken at said inquest and filed with him, and said testimony was material to the defendants for the purpose of cross-examining, contradicting and impeaching the witnesses to be called by the prosecution at the trial of this case, and who also testified before the grand jury which indicted the defendants, and whose names are endorsed on said indictment.

Defendants' affidavits also show that each defendant was unable to pay the expenses and fees of said witnesses, and also that they could not obtain a certified copy of said testimony from the Clerk, because said testimony had been ordered sealed up by the Judge of the District Court of the First Judicial District of the State of Idaho. (Tr., pp. 92 to 120.)

The process requested was proper and the only one available to the defendants for the purpose of securing the testimony and documents desired.

24th Am. & Eng. Enc. of Law, p. 173, *et seq.*

The contents of the documents were not privileged. Section 8382, Rev. Stats. of Idaho, provides:

"The testimony of the witnesses examined before the "Coroner's Jury must be reduced to writing by the Coro- "ner, or under his direction, and forthwith filed by him, "with the inquisition, in the office of the Clerk of the Dis- "trict Court of the county."

The writings when filed with the Clerk of the District Court become a public record.

Section 5965, Revised Statutes of Idaho, provides as follows:

"Every citizen has a right to inspect and take a copy of "any public writing of this Territory, except as otherwise "expressly provided by statute."

Section 5968, Revised Statutes of Idaho, provides:

"Public writings are divided into four classes:
"1. * * *
"2. Judicial records.
"3. Other official documents.
"4. * * *."

And Section 5973 reads:

"A judicial record is the record or official entry of the

" proceedings in a Court of justice, or of the official act of a " judicial officer in an action or special proceeding."

The testimony is not a privileged communication, nor does it embody State secrets.

> Greenleaf on Ev., Vol. 1 (14th Ed.), Sec. 250;
> Rapelje's Law of Witnesses, Sec. 258.

The source from which the information is obtained in a criminal action may be a State secret, but whenever a witness has testified and the law requires that his testimony be filed as a public record, we respectfully submit that it cannot be regarded as a State secret, and when the prosecution places a party upon the witness stand to testify against a defendant, the right to cross-examine and impeach him cannot be denied upon any pretense whatever.

It is legitimate cross-examination to show that a witness has made other statements inconsistent with his present testimony.

Section 6083, Revised Statutes of Idaho, provides:

"A witness may also be impeached by evidence that he " has made at other times, statements inconsistent with his " present testimony; but before this can be done the state- " ments must be related to him, with the circumstances of " time, places and persons present, and he must be asked " whether he made such statements, and, if so, allowed to " explain them. If the statements be in writing, they must " be shown to the witness before any question is put to him " concerning them."

The testimony given by the witnesses before the Coroner's jury was in writing, and before the defendants could

put any questions to the witnesses it was necessary to submit that writing to them.

The law guarantees the defendants the right of cross-examination upon such matters.

The defendants could not, under the circumstances, wait until the witnesses were examined in chief and then ask the Court to wait until a subpoena *duces tecum* could be served upon Mr. Davenport. They were in duty bound to prepare their defense, and the only time when the testimony taken before the Coroner could be used in the cross-examination or impeachment of the witnesses was after their examination in chief and during cross-examination.

The ruling of the Court was to the effect that the defendants were not entitled to, and should not have the subpoena *duces tecum* at any time.

As stated above, the law guarantees the defendant the right of cross-examination upon such matters, and therefore the Court had no right to withhold the only means by which such cross-examination could be made.

Defendants being entitled to such cross-examination, they were entitled to compulsory process for the production of such evidence.

A copy, certified or otherwise, of the testimony would be unavailable for the purposes of cross-examination, for the law requires that the writing be first submitted to the witness before any question is put to him concerning it, and the witness cannot be required to testify upon the presentation to him of a copy, whether certified or not.

The District Court of the First Judicial District of the State of Idaho, upon the filing of the testimony referred to

by the Coroner with the Clerk of said Court, ordered that said package be sealed, and that no one should be permitted to open it, without an order of the Court. (Tr., p. 93.)

This order, we contend, was absolutely void upon its face. The Court had no power to order a public record to be sealed up or to prevent any citizen from inspecting the same.

In Daly *vs.* Dimock, 55 Conn., 579, it was held that under the Connecticut Revised Statutes, Sections 2009, 2011, 2016, providing that the Coroner at an inquest shall reduce to writing the testimony of all the witnesses examined before him, and shall make a return to the Clerk of the Superior Court of his county of all the testimony so taken, and of his findings, or of the verdict of the jury, a defendant indicted for the murder of a person over whom an inquest had been held has a right to inspect all the papers composing the Coroner's return, after it has been filed with the Clerk.

"We do not deem it important," said the Court by Carpenter, J., "to consider whether the testimony, when re-
"duced to writing, as required by law, and lodged with the
"Clerk of the Superior Court, is or is not, in a strict techni-
"nal sense, a public record. For the purposes of this case,
"we may concede that the duties of a Coroner are of a judi-
"cial nature, and that the verdicts of juries and the find-
"ings of Coroners are, in a general sense, matters of record.
"They are results and conclusions of judicial proceedings,
"and are clearly analogous to verdicts and judgments in
"ordinary Courts of justice."

19th A. & E. Ency. of Law, pp. 229-30, note;
People *vs.* Devine, 44 Cal., 452.

If the Court could seal up this record, it could seal up all the public records of the county. This action of the Court was contrary to and in direct violation of the provisions of the various statutes of Idaho above referred to.

The order was, in effect, a suppression or withholding of evidence material to the accused. In other words, a denial of the right of the defendants to show by the documents referred to that the witnesses confronting them, and upon whose testimony they might be deprived of their liberty, were false and unworthy of belief.

It is a wise provision of the law that criminal trials in this country must be public, and that the testimony for or against a person accused of crime cannot be kept secret, either for the protection of false witnesses or for any other reason.

If there had been no order of the Court to seal up the documents, could there be any question as to the right of the defendants to have such testimony produced for the purposes named? It was the duty of the Court to issue the process, and upon service of the same it was the duty of Mr. Davenport to obey the writ, unless he had some lawful excuse, the validity of which the Court is to judge.

Mr. Davenport could have produced the documents in Court without any violation of the order of the State Court, and it would have been then for the lower Court to determine whether the order was valid or void upon its face, and if void, to disregard it.

Amey *vs.* Long, 9 East., 473;
Corsen *vs.* Dubois, 1 Holt's Cas., 239;
Chaplain *vs.* Briscoe, 5 Smed. & M. (Miss.), 198;
Bull *vs.* Loveland, 10 Pick. (Mass.), 9;
U. S. *vs.* Hunter, 15th Fed. Rep., 712.

The materiality or immateriality of the document required by the writ does not affect the duty of the witness to produce, for of that the Court alone, and not the witness, is to be the judge.

Doe *vs.* Kelly, 4 Dowl. Pr. Cas., 273;
Rex *vs.* Russell, 7 Dowl., 693;
O'Toole's Est., 1 Tuck. (N. Y.), 39.

VII.

The Court erred in overruling defendant's objection to the question asked the witness John Clerk: "What official "position, if any, did you occupy in that union on the 29th "of April?" (Tr., p. 282.)

The witness Clark was not indicted or charged with any of the offenses alleged in the indictment, nor was it shown that he was in any way connected with the conspiracy alleged in the first count, or in the acts charged in the second and third counts. Therefore, what he said or did was not binding upon the defendants, and it was not shown that the defendants were present at the place referred to by the witness, or that any of them were in any way connected or concerned with any transaction related by the witness. There was no evidence at that time, or at any other time, tending to show the conspiracy alleged in the first count.

Blanchette *vs.* Holyoke St. Ry. Co., 55 N. E. Rep., 481.

The position the witness held in the union on the 29th of April, or at any other time, was irrelevant, and could not in any way affect any of the defendants. The indictment does not charge the unions, or the members thereof, as such, with being parties to the conspiracy alleged in the first count of the indictment.

VIII.

The Court erred in overruling the defendants' objection to the question asked the witness John Clark: "State "whether or not that is a union mine; that is, the Standard "mine, employs union labor—members of the union." (Tr., p. 282.)

Plaintiffs in error make the same argument as under Assignment of Error No. VII.

IX.

The Court erred in overruling defendant's objection to the question asked the witness John Clark: "Mr. Clark, "will you state where the different unions are located in "the Coeur d'Alene country?" (Tr., p. 282.)

The argument under Assignment of Error No. VII applies here.

X.

The Court erred in denying defendants' motion to strike out the answer of the witness John Clark: "They were

" standing around talking about waiting for the train com-
" ing up, when we were all going down to Wardner." (Tr., p. 283.)

The witness did not refer to any of the defendants, nor does it appear that the persons referred to as "they" meant the defendants, or were persons charged with crime in any of the counts of the indictment.

XI.

The Court erred in overruling defendants' objection to the question asked the witness John Clark "You may " state what their object was in going to Wardner." (Tr., p. 284.)

The question did not refer to the defendants, or any persons indicted with them, or to any persons shown by the evidence to have joined with them in the commission of any offense.

XII.

The Court erred in allowing the witness John Clark to answer: "That morning when we came off of the night " shift we were informed we were to go to Wardner." (Tr., p. 284.)

The answer of the witness was to the question contained in Assignment of Error No. XI, and was wholly indefinite as to the persons who were to go to Wardner, and did not include the defendants, or any persons named in the indictment.

XIII.

The Court erred in overruling defendants' objection to

the question asked the witness John Clark: "From whom "did you get that information, a member of the union?" (Tr., p. 284.)

The answer of the witness to this question was mere hearsay. It was not shown that any member of the union was charged in any of the counts of the indictment with being a party to the alleged conspiracy.

XIV.

The Court erred in denying defendants' motion to strike out the answer of the witness John Clark "No, sir; I do "not know how the information got to the mine, but I was "told by the miners." (Tr., p. 285.)

The answer was hearsay, and the argument under Assignment of Error No. VII also applies.

XV.

The Court erred in overruling defendants' objection to the question asked of the witness John Clark: "Now, Mr. "Clark, I desire you to state what you did that day, so far "as the events of that morning are concerned, that is, going "to Wardner." (Tr., p. 285.)

What the witness did on that day is not evidence against any of the defendants, for the reason it was not shown that Clark was a party to the conspiracy alleged in the first count of the indictment.

XVI.

The Court erred in overruling defendants' objection to

the question asked the witness John Clark: "State how "you happened to go into the box-car." (Tr., p. 285.)

The argument under the last Assignment of Error applies here.

XVII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "State why "you did not get into the passenger coach." (Tr., p. 286.)

The same argument applies.

XVIII.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark on cross-examination: "Did anybody talk to you about the evidence you "should give on the trial of Corcoran, after you got to "Wallace, at any time? State what was said to you and "by whom."

XIX.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark on cross-examination: "Do you know whether or not he is a stockholder in "the Bunker Hill and Sullivan Mining and Concentrating "Company?"

XX.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark upon cross-examination: "I will ask you if prior to the trial of Paul Corcoran, "and on the day when you were called there as a witness

" on that trial, Mr. Mace Campbell did not address you in " the Sheriff's office and tell you that it would be better for " you to stick to what you had said before the Coroner's " jury. Did you not testify in the District Court of the " First Judicial District, in and for Shoshone County, on " the trial of Paul Corcoran, as follows:

" 'Q. Was there anything said to you about your testi- " 'mony at any time since your second arrest?

" 'A. No, sir.

" 'Q. At any time? A. No, sir.

" 'Q. Not to-day? A. Well, yes.

" 'Q. When?

" 'A. This morning I was approached by one man down " 'here.

" 'Q. What is his name? A. Mace Campbell.

" 'Q. Go ahead.

" 'A And he told me it was better for me to stick up to " ' what I had said down before the Coroner's jury.'" (Tr., 287.)

We think these assignments of error may be discussed together, as the same principle is involved in all. It was the object of these questions to ascertain whether the witness had been subjected to any influence or tampered with in any manner, and we think it was legitimate cross-examination.

XXI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Mr. Ames, " I will ask you what relation the Wardner union bears to

" the other miners' unions in the Coeur d'Alenes?" (Tr., p. 288.)

What relation the Wardner union bore to other miners' unions in the Coeur d'Alenes was irrelevant and incompetent; neither the union, nor the members thereof, as such, were indicted, or charged with being parties to the conspiracy alleged in the first count of the indictment.

XXII.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "What was " the report of the Committee?" (Tr., p. 288.)

The report of the committee was hearsay. Neither the miners' union, nor its members, as such, were charged in the first count of the indictment with being concerned in the conspiracy alleged.

XXIII.

The Court erred in overruling defendants' objection to the testimony of the witness Thomas Ames: "The meeting " was closed then, and we all went to the Bunker Hill in a " body to get the men that was still working in the Bunker " Hill,' and to all testimony of said witness of a similar character. (Tr., p. 289.)

The testimony was incompetent. Neither the resolution nor the action of the Wardner Miners' Union was evidence against any of the defendants, and the statement of the witness did not tend in any way to prove the conspiracy alleged in the said first count.

XXIV.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "I will ask "you to state briefly what took place on the 29th of April— "came under your observation, commencing in the morn- "ing. Well, what you did and what you saw." (Tr., p. 289.)

What the witness did was immaterial and irrelevant. What he saw was objectionable for the reasons above stated.

XXV.

The Court erred in denying defendants' motion to strike out the testimony of the witness Thomas Ames: "Well, I "went to Page's Hotel and found out what I could, in the "morning, what was going on. In fact, I didn't find any- "thing much, because no one seemed to know anything "about it, only was to go to the depot at 11 o'clock to meet "a train. Two or three of the boys told me not to go—to "stay there. I went into Mr. Page's hotel, Mr. Cox's store." (Tr., p. 289.)

The answer of the witness should have been stricken out. It does not appear that he received any information from any of the persons indicted, or the parties to the conspiracy alleged in the first count; that somebody was to go to the depot at 11 o'clock to meet the train, is indefinite and uncertain, and does not show that any of the defendants, or those charged in the indictment, were to meet the train. That "two or three of the boys told me not to go down—to "stay there," is also indefinite and uncertain as to who the

boys were. It does not appear that witness referred to any of the defendants or those charged in the indictment.

XXVI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Did you "have a statement from any member of the union that "would lead you to believe it—cause you to believe it?" (Tr., p. 290.)

The question called for hearsay testimony. The members of the union referred to were not identified or named, and it does not appear that they were in any way connected with the defendants.

XXVII.

The Court erred in denying defendants' motion and request that a subpoena duces tecum be issued and served upon S. H. Hays, W. E. Borah and J. H. Hawley, requiring them to appear and bring with them books containing the shorthand notes of the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joseph Phifer, A. M. St. Clair, Jas. B. Pipes and Jos. Kendall, taken at the inquest held upon the bodies of James Cheyne and John Smith in Shoshone County, Idaho. (Tr., pp. 290-294.)

The affidavit of the defendants (Tr., p. 290) shows that at the request of S. H. Hays, Attorney-General of the State of Idaho, and W. E. Borah, J. H. Hawley and J. H. Forney, attorneys representing the State, the District Court of the State of Idaho ordered the package containing the testi-

mony taken at the inquest on the bodies of James Cheyne and John Smith to be sealed, and no one permitted to open it, without an order of the Court; and that a certified copy should not be made, given, or uttered, or issued, by H. M. Davenport, Clerk of said Court; that the testimony should be sealed up so as to conceal the contents of said package, so as to prevent defendants or any of them, or their attorneys or counsellors from inspecting or copying said testimony.

That said Clerk has refused to give a certified copy or to permit the defendants, or any of them, or their attorneys or counsellors, an opportunity to examine the same, or take a copy thereof. That the said testimony is material to the defendants in order to cross-examine, impeach and contradict persons who appeared before the grand jury, who found indictments in this case, and who were expected to be witnesses on the trial.

The defendant being denied process, and the prosecution having refused to produce said testimony, and having joined with the representative of the State of Idaho in denying to the defendants the right to use said testimony for the purposes aforesaid, and from obtaining a certified copy, or any copy of the testimony, the defendants sought to obtain the shorthand notes of the testimony, not for the purpose of offering the notes in evidence, but simply to enable the shorthand reporter to prove by the said notes what was said by the various witnesses on the occasion named. (Tr., p. 316.)

The evidence of the shorthand reporter who took the notes, of course, would not make them competent evidence;

but the shorthand reporter may refresh his recollection from the minutes and then state, when his recollection is refreshed, if he can, what the testimony was.

Wilson *vs.* Com., 54 S. W. Rep., 946, 948.

The attorney for the State of Idaho, Mr. Forney, virtually admitted the purpose of withholding the shorthand notes referred to, and the United States District Attorney joined them in the effort to prevent the defendants from contradicting or impeaching witnesses for the prosecution on the trial of this cause.

Mr. Cozier denied that the notes were in the hands of the prosecution, or that there was anything in the record to show that the notes were under the control of the prosecution, but it was shown that the District Attorney opposed the motion for a subpoena *duces tecum* to bring these papers into Court. (Tr., pp. 316, 317.)

It appears that Mr. Forney was permitted to appear in this cause and oppose the motion of the defendants to obtain possession of said notes for the purposes stated, and that Mr. Cozier joined him in such opposition, which was admitted by Mr. Cozier in the following statement:

"I object to it on the general ground that it would be "incompetent, irrelevant and immaterial—nothing to do "with the prosecution of this case, or any fact connected "with this case." (Tr., p. 320.)

The objection urged by the District Attorney that it was irrelevant and incompetent, and had nothing to do with the

case, is simply to deny the right of cross-examination of the witnesses for the prosecution.

The defendants had the right at the time to apply for compulsory process to secure the notes in question.

The accused is entitled to compulsory process for witnesses even before indictment.

1 Burr Tr., 158, 159.

Chief Justice Marshall said:

"The right of an accused person to the process of the "Court to compel the attendance of witnesses, seems to fol- "low necessarily, from the right to examine those wit- "nesses; and whenever the right exists it would be reason- "able that it should be accompanied by means of rendering "it effectual. * * * The genius and character of our "laws and usages are friendly, not to condemnation, at all "events, but to a fair and impartial trial; and they conse- "quently allow to the accused the right of preparing the "means to secure such a trial. * * * The Constitu- "tion and laws of the United States will now be considered "for the purpose of ascertaining how they bear upon the "question. The sixth amendment to the Constitution "gives to the accused in all criminal prosecutions a right "to a speeedy and public trial, and compulsory process "for obtaining witnesses in his favor. The right given by "this Article must be deemed sacred by the Courts; and "the Article should be so construed as to be something "more than a dead letter."

1 Burr Tr., 158, 159.

XXVIII.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Was it not "the talk among the members of the Wardner union that "necessary force would be exerted to drive the non-union "employees out of the camp, or prevent their working in "the Bunker Hill and Sullivan, and was not that the talk "among the members of the Wardner union?" (Tr., p. 259.)

The statement was mere hearsay and not binding upon the defendants. It is not charged in the indictment that any conspiracy existed between the parties referred to and the defendants.

Blanchette *vs.* The Holyoke St. Ry. Co., 55 Northeastern Rep., p. 418.

XXX.

The Court erred in overruling defendants' objection to the question asked the witness Albert Burch: "Mr. Burch, "I desire you to commence with the week preceding the "blowing up of the Bunker Hill and Sullivan mill and re-"late briefly the occurrences so far as the troubles between "the Wardner union and your company are concerned." (Tr., p. 295.)

The action of either the Bunker Hill and Sullivan Mining Company, or the Wardner union, was not binding upon the defendants. It is not shown that either of them were parties to the conspiracy alleged in the first count of the indictment.

Blanchette *vs.* The Holyoke St. Ry. Co., 55 N. E. Rep., 418.

XXXII.

The Court erred in denying defendants' motion to strike out that part of the answer of the witness Albert Burch as to what effect the notice had upon his mind: "Wardner, "Idaho, April 13th, 1899. At a regular meeting of the "Wardner Miners' Union, April 18th, W. F. M., held upon "the above date, it was decided to request all men em- "ployed in and about the Bunker Hill and Sullivan mine "to make application for membership in the Wardner Min- "ers' Union immediately. (Signed) N. A. Flynn, Commit- "teeman. That attracted my attention to the possibility "of there being agitation in progress in the mine." (Tr., p. 296.)

We make the same argument here as under Assignment of Error XXVIII and XXX.

XXXV.

The Court erred in overruling defendants' objection to the statement of the witness Albert Burch as to what he had said to the employees of the Bunker Hill and Sullivan Company. (Tr., pp. 297-298.)

The speech of Burch to the employees of his company was not in any way binding upon any of the defendants. It did not tend to show that there was any conspiracy between the speaker, or any of the parties addressed by him, or connected with the defendants in any way.

XXXVII.

The Court erred in overruling defendants' objection to "the question asked the witness Walter Taylor: "I will "ask you if you had any conversation with Mr. Ed. Boyle, "President of the Wardner Miners' Union, on or about the "26th of April, relative to your going to work, or heard any "statement made by Boyle in regard to you or men going "to work in the Bunker Hill and Sullivan Mine?" (Tr., p. 303.)

The objection should have been sustained for the reason that the conversation between Boyle and the witness was not binding upon the defendants, or competent evidence against them. Boyle was not put upon trial under the indictment. There was no evidence tending to show that Boyle was a party to the conspiracy alleged in the first count of the indictment.

XXXVIII.

The Court erred in overruling the defendants' objection to the question asked the witness I. T. Rouse: "State what "he said, if anything, about the Western Federation of Mi-"ners." (Tr., p. 303.)

This had no tendency to prove the conspiracy alleged, and does not show that the defendants on trial were in any way connected with the matters related by the witness.

XXXIX.

The Court erred in overruling defendants' objection to the question asked the witness F. R. Culbertson: "I will

"ask you if you had any conversation with Mr. Corcoran "on the morning of the 29th of April relative to where he "was going that day, or where the members of the Burke "union were going?" (Tr., pp. 304, 305.)

Mr. Corcoran, although indicted, was not put upon trial in this case. There was no evidence to show that he was in any way concerned in the conspiracy alleged in the first count of the indictment. His statements were not binding upon the defendants; it is not shown that any of the defendants were present. The statement that the witness was informed there was a meeting going on in the Miners' union hall (Tr., p. 150), and the conversation between the witness and Corcoran did not relate to the conspiracy alleged in the first count of the indictment. It related to a strike.

XL.

The Court erred in overruling defendants' objection to the testimony of the witness Emil Anderson that he did not work on April 29th, 1890; that on the morning he was told by some men there would be no work that day, and that there would be a meeting in the union hall; that he did not know who it was informed him, but that he attended the meeting at the hall, and to all testimony of like character. (Tr., p. 304.)

The objection to this testimony should have been sustained. It was incompetent against the defendants and did not tend to prove the conspiracy alleged in the indictment, or that the defendants were in any way connected with it.

XLII.

The Court erred in denying defendants' motion to strike out the portion of the answer of the witness A. M. St. Clair referring to the defendant Malvey: "A. I have been in the "penitentiary, yes. There is where I met Mr. Malvey." (Tr., p. 305.)

The answer of the witness was not responsive to the question and was a voluntary statement. The testimony tended to injure and prejudice the defendant referred to before the jury, upon a matter in no way connected with the charges made in the indictment. This was error.

People *vs.* Vidal, 121 Cal., 221;
People *vs.* Lynch, 122 Cal., 501.

XLIII.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny, for the purpose of contradicting the witness. (Tr., p. 305.)

It was proper cross-examination to show of what offense the witness was convicted. It was not collateral, and the record was proper evidence to prove that his statement upon that material matter was false. It was a material and impeaching question.

Wicks *vs.* Lippman, 13 Nev., 500.

LXIV.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of

the witness A. M. St. Clair for larceny, for the purpose of showing that said witness had given a different name at the time of his conviction than at this time. (Tr., p. 306.)

The argument under assignment of error XLIII is applicable here.

XLV.

The Court erred in sustaining plaintiffs' objection to the defendants' offer to introduce the record of the conviction of the witness St. Clair for larceny, for the purpose of showing the character of the witness. (Tr., p. 307.)

The same argument applies to this assignment.

XLVI.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny, for the purpose of impeaching said witness. (Tr., p. 307.)

The defendant had a right to introduce the record for the purpose of impeaching the witness.

Sec. 6082, Rev. Stats. of Id.

XLVIII.

The Court erred in overruling defendants' objection to the question asked the witness St. Clair: "You stated you "were in the penitentiary; state to the jury whether you "were pardoned out." (Tr., p. 308.)

The objection should have been sustained upon the ground that the pardon was in writing, and was the best evidence.

L.

The Court erred in overruling defendants' objection to the question asked the witness G. A. Olmstead: "What "time do you go by there?" (Tr,. p. 309.)

The objection should have been sustained because the question was incompetent and immaterial, and the only time involved was the schedule time fixed by the U. S. Post Office Department.

LI.

The Court erred in denying defendants' motion to strike out the answer of the witness Olmstead: "Well, there was "quite an excitement at Wardner. There was big gangs of "masked men there, armed, and a great deal of excitement. "Blowed up the mill." (Tr., p. 309.)

The motion to strike out the answer of the witness should have been allowed, as the blowing up of the mill did not tend in any way to prove the existence of the conspiracy alleged in the first count of the indictment, or to connect any of the defendants, or any of the persons named in the indictment with the parties who committed the act.

LIV.

The Court erred in overruling defendants' objection to the testimony of the witness Marshall as to the delay of the mail at Wardner. (Tr., pp. 310-317.)

The objection to the testimony of the witness as to the time of the arrival or departure of the train at Wardner should have been sustained for the reason that the law requires a register of the time of arrival and departure of the

mails to be kept, and that register is the best evidence. (Tr., p. 190.) And further, that the transaction related to events occurring on the Oregon Railway and Navigation Co.'s tracks, and had no connection whatever with the conspiracy alleged in the first count of the indictment.

LVIII.

The Court erred in overruling defendants' objection to the question asked the witness Mrs. Tony Tubbs: "What "came under your observation then in regard to the trou- "bles between the union and the Bunker Hill and Sullivan "mine?" (Tr., p. 312.)

The transactions on the 26th of April have nothing at all to do with the crimes alleged in the indictment and do not tend to prove a conspiracy.

LX.

The Court erred in overruling defendants' objection to the answer of the witness J. H. Martin: "He said, when "they got down to Wardner, they detailed about seventy- "five men—throwed them out on the left-hand side, along "a ridge—high piece of ground. Said there was a lot of "men went to the mill, placed dynamite in place." (Tr., p. 313.)

The testimony was irrelevant and immaterial. The defendant Wallace did not state that he participated in any of the transactions. He only related what he had seen other men do. Who those men were was not stated. None of the other defendants were identified, and the testimony had

no tendency to prove the conspiracy alleged in the indictment. (Tr., pp. 225 to 229.)

LXI.

The Court erred in overruling defendants' objection to the question asked the the witness Thomas Wright: "Why "not?" (Tr., pp. 313, 314.)

The witness' reasons for not selling were immaterial and irrelevant. It only gave the witness an opportunity to state something which was prejudicial to the defendant in the way of an opinion or an impression. (Tr., p. 229.)

LXIII.

The Court erred in overruling defendants' motion to strike out all testimony of the witnesses A Burch, Fred Funk, A. M. St. Clair, William McMurtrie, A. S. Crawford, Sophia Moffit, M. J. Sinclair, William Doherty, and James H. Martin. (Tr., pp. 315-316.)

The motion should have been allowed for the reason that the defendants had been unable to cross-examine the witnesses and had been unable to obtain either the testimony of the said witnesses taken at the Coroner's inquest, or the shorthand notes thereof, for the purpose of contradicting and impeaching them, and for the reasons stated under assignment of error No. 6.

The only remedy was by a motion to strike out.

Rapelje's Law of Witnesses, Sec. 245, Subd. 2;
People *vs.* Cole, 2 Lansing, 370;
Pringle *vs.* Pringle, 59 Penn. St., 281;

Stevens *vs.* People, 19 N. Y., 570;
Kissam *vs.* Forest, 25 Wend., 650;
Sperry *vs.* Moore's Estate, 42 Mich., 361;
Hewlett *vs.* Wood, 67 N. Y., 394;
8th Ency. Pl. and Pr., pp. 90 and 100, and notes.

LXIV.

The Court erred in denying the defendants the right to show to the jury by the witness J. H. Forney that the prosecution had withheld evidence which would impeach certain witnesses for the prosecution, and that the prosecution had not acted in good faith toward the defendants. (Tr., pp. 318-319.)

The defendants should have been permitted to show to the jury that the prosecution and persons connected with it, deliberately and willfully withheld evidence which might operate as a shield for witnesses brought against the defendants, and thereby protect such witnesses from contradiction or impeachment. (Tr., pp. 318, 319.)

This was not a matter of law. It was a question of fact whether the prosecution has suppressed or withheld evidence of the character named. It was this fact which the defendants desired to prove, and that being established, it was then a question of law what presumption, if any, it would authorize.

The withholding of evidence favoring a prisoner by the prosecution is severely rebuked in People *vs.* Gordon, 40 Mich., 716.

The evidence referred to, as shown by the affidavits of the defendants, which were not denied by the prosecution, was required for the purpose of impeaching certain witnesses for the prosecution, and the withholding of the same by the prosecution would naturally and fairly raise a presumption that it would be adverse to the prosecution, and would impeach the witnesses named.

Winchell *vs.* Edwards, 57 Ill., 48;
Starkie on Evi., p. 447, Note.

Therefore, a fact which would give rise to such presumption is admissible evidence on the part of the defendants.

LXV.

The Court erred in refusing to allow defendants to show by the witness J. H. Forney that the shorthand notes of the testimony taken before the Coroner of Shoshone County, Idaho, upon the inquest on the bodies of James Cheyne and John Smith were withheld from the defendants, and that witness refused to produce them, and that the United States District Attorney prosecuting this case joined said

Forney in opposition to defendants' request for said short-hand notes. (Tr., p. 320.)

The argument made under assignment of error No. LXIV applies.

LXVI.

The Court erred in sustaining plaintiff's objection to the question asked the witness James B. Pipes, while said witness was testifying in rebuttal: "You remember that very "distinctly—those expressions—and you expect now that "the jury will be excited, do you not?" (Tr., p. 321.)

It was competent to show the motive of the witness and his desire to excite the jury against the defendant, and the question was proper cross-examination. The expressions referred to appear at Transcript 279 and 281.

LXVII.

The Court erred in not striking out all of the testimony concerning the action of the parties engaged in blowing up the Bunker Hill mill, and all declarations and statements of the parties thus engaged, and all testimony concerning the actions and declarations of the members of the various miners' unions concerning their actions and intentions in reference to driving away the employees of the Bunker Hill and Sullivan Mining and Concentrating Company, and all testimony concerning the acts of the miners' unions.

The Court should have allowed the motion to strike out. It had no reference whatever to the conspiracy charged in the indictment, and was wholly immaterial and irrelevant.

LXVIII.

The Court erred in not striking out all the testimony concerning any conspiracy on the part of the members of the various miners' unions to blow up or injure the Bunker Hill mill, or to interfere with the employees of the Bunker Hill and Sullivan Mining and Concentrating Company, or concerning any conspiracy except the conspiracy alleged in the first count of the indictment.

The Court should have granted the motion for the reason stated under assignment of error LXVII.

LXIX.

The Court erred in not striking out all of the evidence concerning the acts, declarations, or statements of any person or persons not shown to be indicted with the defendants or shown to be engaged in the conspiracy alleged in the first count of the indictment.

Plaintiffs in error make the same argument as under assignment of error LXVII.

Blanchette *vs.* The Holyoke St. Ry. Co., 55 N. E. Rep., 481.

LXXI.

The Court erred in refusing to give the jury the following instruction, requested by the defendants, No. IV: "If "the defendants, or any of them, belong to such organiza- "tion or association for unlawful purposes, and that some "of the members as individuals or combined with others, "independent of the organization, to willfully and mali-

" ciously carry out the unlawful purpose as set forth in the " indictment, but that such organization as a whole, or " these defendants as individuals, did not join or partici- " pate in such combination, then such defendant or defend- " ants cannot be held responsible for the acts of such com- " bination or of such individuals."

The instruction was proper in form and substance, and should have been given.

LXII.

The Court erred in refusing to give the jury the following instruction requested by the defendants and numbered V:

"If you find that the defendants, or any of them, did not " combine to obstruct or retard the passage of the United " States mail, as set forth in said first count, then such de- " fendants should be acquitted."

This instruction states the law, as we understand it, and should have been given.

LXXIII.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VI:

"The offense charged in said first count, to wit, obstruct " and retard the passage of the mail as therin set forth, is " an offense exclusively against the United States and cog- " nizable only in the Federal Courts. It is not an offense " against the State of Idaho. The stopping of the railroad " trains and railroad cars is an offense against the State of " Idaho and not an offense against the United States."

This instruction states the law, and should have been given.

Pettibone *vs.* U. S., 148 U. S., 197.

LXXIV.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VII:

"The evil intent in committing the offense against the "State of Idaho is not sufficient to constitute the offense "charged in this indictment. To constitute the offense set "forth in said indictment, the specific intent to violate the "laws of the United States and to commit the crime of will- "fully obstructing and retarding the United States mails, "as set forth in said count, must be found to have existed "in the minds of the defendants in order to justify a con- "viction."

LXXV.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VIII:

"The meaning of the words 'knowingly' and 'willfully' "is defined as follows:

"'Doing or omitting to do a thing knowingly or willfully "'implies, not only a knowledge of the thing, but a deter- "'mination with a bad intent to do it or omit doing it,' and "to constitute the crime set forth in said first count, it "must be proved, beyond a reasonable doubt, that the act

" of obstructing or retarding the passage of the mail was " done knowingly and willfully by the defendants; that is " to say, that they intended to do it."

LXXVI.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered IX:

"If you find from the evidence that a conspiracy was " formed by a number of persons for the purpose and with " the intent to commit a crime against the State of Idaho, " and that incidentally the United States mail was obstruct- " ed or retarded by said conspirators, but without any know- " ledge and without any intention on the part of said con- " spirators to obstruct or retard the mail, such acts would " not constitute an offense against the United States."

LXXVIII.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered XI:

"In order to make one an aider and abetter of conspira- " tors, it is necessary that he should do or say something " showing his consent to the felonious purpose and contrib- " uting to its execution."

LXXIX.

The Court erred in refusing to give the jury the follow-lowing instruction requested by the defendants, numbered XII:

" You are instructed that it makes no difference in this

" case whether the United States mails were obstructed or " retarded. The offense in this case consists in the unlaw- " ful agreement or conspiracy to obstruct or retard. If " there was no agreement or conspiracy to obstruct, then " the defendants are not guilty of the crime charged and " you should acquit them.

" Obstructing and retarding the passage of the United " States mail is a distinct and independent offense from " that of conspiring to obstruct and retard."

Pettibone *vs.* U. S., 148 U. S., 197.

These instructions were all proper and should have been given.

LXXXI.

The Court erred in overruling defendants' motion for a new trial. (Tr., pp. 47, 48.)

The fourth ground of said motion is, "That the verdict " is contrary to law and the evidence in the case."

There was no evidence to prove that the conspiracy alleged in the first count of the indictment was ever entered into by the defendants, or any of them, or by the defendants and any other persons.

The theory of the prosecution was that a conspiracy had been entered into by certain parties to drive away the employees of the Bunker Hill and Sullivan Mining and Concentrating Company, and to blow up its mill. That in the attempt to carry out this conspiracy the conspirators took possession of a railway train carrying the United States

mail, and thus obstructed and retarded the passage of the mails.

The evidence shows that the car in which the mail was carried was not marked or designated in any way, and that there was nothing to indicate in any way that it carried the United States mail. (Tr., p. 209.) There was no evidence to show that the conspirators named knowingly or willfully obstructed or retarded the passage of the mail, and no evidence to show that they had any reason to believe that the train did carry the mail.

If the conspiracy referred to in the evidence was proved, we may concede, for the sake of argument, that defendants might have been convicted under the second and third counts of the indictment, if it had been proved that they knowingly and willfully obstructed and retarded the passage of the mail, as that was an essential element of the crimes charged in those counts; but, under the first count, the conspiracy must be proved as alleged in the indictment. It is not sufficient to allege some other conspiracy and then show that the overt act was committed in pursuance of that other conspiracy.

U. S. *vs.* Goldberg, 7 Bissell, 175;
Evans *vs.* People, 91 Ill., 384;
4th Lawson's Crim. Def., 524, 526;
State *vs.* Hadley, 54 N. H., 224;
Com. *vs.* Kellogg, 7 Cush., 437;
Com. *vs.* Harley, 48 Mass. (7 Metc.), 506.

It is not sufficient to prove a conspiracy to drive away the employees of the Bunker Hill and Sullivan Company,

or to blow up the mill. If that conspiracy was established it was an offense against the State of Idaho, with which the United States had nothing whatever to do, and the mere fact that the mail was knowingly and willfully retarded would not constitute or prove a conspiracy to attain that object.

Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.

Felton *vs.* U. S., 96 U. S., 699, 702;
Approved in Potter *vs.* U. S., 155 U. S., 438, 446.

Proof of the former conspiracy would not tend to prove the latter, any more than the latter would tend to establish the existence of the former.

Pettibone *vs.* U. S., 148 U. S., 197, 209;

The conspiracy is the gist of the action and must be proved as laid.

6 Ency. of Law (2d), 834;
Pettibone *vs.* U. S., 148 U. S., 197;
U. S. *vs.* Donan, 11 Blatch., 168;
Newell *vs.* Jenkins, 26 Pa. St., 159;
People *vs.* Richards, 1 Mich., 216;
U. S. *vs.* Nunemaker, 7 Biss., 111;
Evans *vs.* People, 90 Ill., 384;
4 Lawson's Cr. Def., 524, 528.

For the foregoing reasons we respectfully submit that the judgment should be reversed and a new trial ordered.

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